

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHIRLEY BYARD

Claimant

VS.

UNDERGROUND VAULT & STORAGE

Respondent

AND

LM INS. CORP. and LIBERTY INS. CORP.)

Insurance Carriers

Docket No. 1,048,873

ORDER

STATEMENT OF THE CASE

Bretz Law Offices, LLC, (Bretz) requested review of the August 15, 2011, Order Apportioning Attorney Fees entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on November 18, 2011. The Director appointed E. L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample and Joseph Seiwert to serve in place of current Board Member Tom Arnhold, who recused himself from this matter.¹ Matthew L. Bretz, of Hutchinson, Kansas, appeared for appellant Bretz. Mitchell W. Rice, of Hutchinson, Kansas, appeared for Mann Law Offices L.L.C. (Mann). Katie Black, of Kansas City, Kansas, who is the attorney for respondent and its insurance carriers, did not file a brief or participate in oral arguments.

The Administrative Law Judge (ALJ) allocated 100 percent of the attorney fees on the first \$40,000 of the settlement of this claim to Bretz. The ALJ ordered that the remaining attorney fee should be divided 2/3's to Mann and 1/3 to Bretz. Both Bretz and Mann were awarded reimbursement of its respective expenses. Bretz was ordered to reimburse Mann for the cost of copying Shirley Byard's file.

¹ As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Kinch will continue to serve as a Board Member Pro Tem in this case.

ISSUES

Bretz requests review of the ALJ's Order, arguing that in addition to the 100 percent of the attorney fees on the first \$40,000 of the settlement, it is also entitled to 90 percent on any portion of the settlement in excess of \$40,000. Bretz also argues that it should not be limited to fees based solely on *quantum meruit* because it was discharged without cause, because a settlement offer was made in the amount of \$40,000 before the termination of Mitchell Rice, and because it contributed to materially advance Ms. Byard's claim. In the event the Board finds Bretz is limited to fees based on *quantum meruit*, Bretz argues the fees should not be calculated solely on number of hours worked multiplied by a reasonable rate.²

Mann argues that the Board should determine the value of Bretz' lien on the attorney fees based upon *quantum meruit*. Mann argues that Ms. Byard was a longtime friend of Mr. Rice's family, which it claims was the only reason Ms. Byard hired the Bretz firm. Mann also asks that the Board affirm the ALJ's order giving it a credit of \$89.10 for expenses in getting a copy of Ms. Byard's case file.

The issues for the Board's review are:

- (1) How should the attorney fees in this case be divided between Bretz and Mann?
- (2) Should Bretz reimburse Mann for the costs of photocopying claimant's file?

FINDINGS OF FACT

On November 30, 2009, Shirley Byard signed an attorney fee contract hiring Bretz to represent her in her workers compensation claim. The case was handled for Bretz by Mitchell Rice, who at the time was an associate in the Bretz law firm. During the time of Bretz' representation, Ms. Byard was sent to Dr. Pedro Murati for a medical evaluation and to Robert Barnett, Ph.D. for a work disability analysis. On December 28, 2010, respondent made a settlement offer in the amount of \$28,069.52 and on February 22, 2011, respondent made another settlement offer, that time in the amount of \$40,000.

On March 15, 2011, Mr. Rice's employment with Bretz was terminated. On March 21, 2011, Mr. Rice wrote Ms. Byard and informed her he was no longer employed by Bretz and advising her she would need to choose whether to let him continue to represent her or remain with Bretz. On March 24, 2011, Ms. Byard signed the letter indicating she wanted Mr. Rice to represent her. Shortly thereafter, Mr. Rice became associated with the firm of Mann, and on April 1, 2011, Ms. Byard signed a contract

² Bretz further objects to the ALJ's Order as demonstrating overt prejudice. Bretz brief (filed Sept. 21, 2011) at 3.

employing the Mann firm to represent her interests in the workers compensation claim. Bretz filed a Notice of Attorney Fee Lien claiming a 25 percent attorney fee lien upon all compensation made in Ms. Byard's workers compensation claim.

Mr. Rice requested Ms. Byard's workers compensation file. He received it only after paying Bretz a copying fee of \$89.10.

Mr. Rice, on behalf of the Mann firm, continued to negotiate a settlement in Ms. Byard's claim. The claim was eventually settled for the amount of \$75,000, and a Settlement Hearing was held on July 5, 2011, approving the settlement. The attorney fees on the settlement were \$18,750. Because of the Bretz lien, the amount of \$23,750 was withheld from the settlement to cover attorney fees and expenses. Ms. Byard was issued a check in the amount of \$51,250.

Because Bretz was handling Ms. Byard's claim on a contingency fee basis, no record was kept of the amount of time it spent on the claim. Bretz attached a itemization of time spent prepared by the firm estimating the amount of time spent working on Ms. Byard's claim which shows the Bretz firm spent approximately 34.4 hours working on Ms. Byard's claim from November 30, 2009, through July 13, 2011. Bretz also provided the court with a list of expenses incurred during its representation of Ms. Byard in the amount of \$1,741.98.

Mr. Rice disputes the amount of time Bretz estimates was spent on Ms. Byard's claim. He signed an affidavit on August 8, 2011, stating his best estimate was that he spent 20 hours on Ms. Byard's claim while working at Bretz. The affidavit indicates he spent 21.7 hours working on Ms. Byard's claim since leaving Bretz.

In its Order Apportioning Attorney Fees, the ALJ found Bretz was entitled to its expenses and 100 percent of the attorney fees from the first \$40,000 of the settlement and two-thirds of the remaining attorney fees. Bretz was to reimburse Mann the amount of \$89.10 for the cost of copying Ms. Byard's file. Respondent was directed to issue a check in the amount of \$3,290.42 to Ms. Byard for the balance of her settlement; a check in the amount of \$5,922.43 to Mann (2/3's of \$8,750 [the amount of attorney fees after the first \$10,000 taken out] + copy fees of \$89.10); and a check in the amount of \$14,537.15 to Bretz (\$10,000 [100% attorney fees on the first \$40,000] + \$2,916.67 [1/3 of the remaining attorney fees] + expenses in the amount of \$1,709.58 less \$89.10 in copy fees).

PRINCIPLES OF LAW

The attorney fees in a workers compensation proceeding *shall not exceed a reasonable amount* for the services rendered *and* shall not exceed 25 percent of the

disability compensation recovered.³ Moreover, attorney fees may be apportioned between attorneys in a reasonable and proper manner, considering the particular circumstances in each case.⁴

The Workers Compensation Act provides that all disputes regarding attorney fees shall be decided by the administrative law judges.⁵ The division of attorney fees should be considered on a case-by-case basis after considering all relevant factors. Some of those factors are listed in K.S.A. 44-536(b), which specifically includes:

- (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney . . .
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;
- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and⁶
- (8) the experience, reputation and ability of the attorney or attorneys performing the services.

Additionally, the Court of Appeals has held that when resolving attorney fee disputes, the director of workers compensation has the power and discretion to apportion fees. But the director must act reasonably, considering the circumstances of each case.

When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.⁷

³ See K.S.A. 44-536(a).

⁴ See K.S.A. 44-536(h) and *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

⁵ K.S.A. 44-536(h).

⁶ See Kansas Rules of Professional Conduct 1.5 (Fees) (2010 Kan. Ct. R. Annot. 458).

⁷ *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, Syl. ¶ 5, 663 P.2d 663 (1983).

In *Madison*,⁸ the Kansas Court of Appeals ruled that attorneys who are discharged before the contingency provided in a contingency fee contract may not, generally, recover the contingency fee. Instead, the fees are to be determined based upon the reasonable value of the services the attorney has rendered, or under *quantum meruit*. And in that same opinion, the Kansas Court of Appeals cited both *In re Phelps*⁹ and *Shouse v. Consolidated Flour Mills Co.*¹⁰ as establishing a similar rule when attorneys are discharged before completing the contracted services for stipulated attorney fees.

KRPC 1.6(d) (2010 Kan. Ct. R. Annot. 522) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

The Kansas Bar Association (KBA) Legal Ethics Opinion No. 92-5 (July 30, 1992) states in part: "The purpose of [ABA Model Rules of Professional Conduct (MRPC)] 1.16(d) is protection of the client's interests, and the attorney's interests are incidental thereto."

The ABA Model Rules of Prof'l Conduct (2011 Annot.) R. 1.16 states:

Upon termination of representation, the lawyer has a duty to surrender promptly papers and other property to which the client is entitled. . . . In general, if a lawyer wishes to keep a copy of a client's file, the lawyer must assume the costs of copying documents generated or paid for by the client, although delivery and assemblage costs can normally be charged to the client.

KBA Legal Ethics Opinion No. 92-5 further states:

"Client's property" under MRPC 1.16(d) means counsel may charge a reasonable photocopy fee on that portion of a file which does not constitute "client's property," and which is requested to be photocopied by the client. "Client's property" includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand

⁸ *Madison*, 8 Kan. App. 2d at 579.

⁹ *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970).

¹⁰ *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 Pac. 657 (1931).

and interpret documents highlighted above. Such documents, being “client property” must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of “client property” may be copied at a reasonable expense to the client such “expense” to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.

CONCLUSION

The parties have argued several different approaches to apportioning the attorney fees. Under circumstances such as this, the Board generally approaches the division of fees on the basis of *quantum meruit*, looking at the factors enumerated in the statute and the KRPC and, in particular, the time spent by the attorneys respectively. However, in this case, there is a marked difference of opinion concerning the accuracy of the itemizations of time submitted by the other attorney. The ALJ reasoned:

Under all of the circumstances, it does not appear that either of the approaches suggested by Bretz or Rice gives an adequate or equitable formula for division of the attorneys fees. The court will allocate 100 percent of the attorneys fees on the first \$40,000 of the settlement to Bretz (\$10,000), and the remainder of the attorneys fees 2/3 to Rice, and 1/3 to Bretz. Bretz will also reimburse Rice for the cost of copying Byard’s file. The file was Byard’s, and Bretz’s interests were protected by its lien. By virtue of that lien, Bretz no longer had a right to retain Byard’s file. If Bretz wanted to retain a copy of the file, it should bear the expense of making that copy, not Byard, and not Rice.¹¹

Because the contingency provided for in the contingency fee contract did not occur during the time claimant was represented by Bretz, the Board disagrees with the ALJ’s decision to award Bretz 100 percent of the attorney fees on the first \$40,000 of the settlement. Instead, the Board will apportion the entire amount of the attorney fees based on *quantum meruit*.

The Board finds that a reasonable apportionment of the entire amount of the attorney fees is 60 percent to Bretz and 40 percent to Mann.

Some commentators draw a distinction between the client’s property, which must be returned to the client without charge, and work product of the attorney, for which a reasonable expense may be charged for photocopying.¹² In this case, however, no such distinction has been made and no itemization was provided whereby the Board could

¹¹ ALJ Order Apportioning Fees, filed Aug. 15, 2011, at 3.

¹² See KBA Legal Ethics Opinion 92-5; Peter H. Geraghty, *Whose File Is It Anyway?*, ABA E-news for Members September 2006.

determine what charges were for copying client property versus what may be attorney work product. Accordingly, the Board finds that Bretz should reimburse Mann for the cost of photocopying Byard's file.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order Apportioning Attorneys Fees of Administrative Law Judge Bruce E. Moore dated August 15, 2011, is modified to award Bretz 60 percent of the attorney fees and Mann 40 percent but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Bretz Law Offices, LLC
Mitchell W. Rice, Attorney for Mann Law Offices L. L. C.
Katie M. Black, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge